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In the Supreme Court
of the United States

OCTOBER TERM 1970

No. ~~1609~~ 70-197

RAYMOND KELLY,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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OPINIONS OF THE COURT BELOW

This cause was tried in the Circuit Court of Multnomah County, Oregon, to a jury which returned a verdict for the defendant railroad. The plaintiff appealed to the Supreme Court of Oregon which affirmed the lower court's judgment on February 24, 1971.

It is from this judgment that plaintiff petitions for certiorari. A true and correct copy of the opinion of the Oregon Supreme Court, reported at — Or. —, 481 P.2d 56, is appended hereto.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the proper interpretation of the Federal Employers Liability Act (FELA), 45 U.S.C. § 51, et seq. The petitioner does not seek a mere review of evidence or facts, but prays for the formulation by this Court of the correct manner of applying the FELA to *all* actions arising thereunder.

QUESTION PRESENTED FOR REVIEW

This court said in *Rogers* v. *Missouri Pac. R.R.*:[1]

> "Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. *It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes,* including the employee's contributory negligence."

The court further stated in *Rogers*:

> "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."[2]

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[1] 352 U.S. 500 at 506-507, 1 L. Ed. 2d at 499-500 (1957) (Emphasis added)

[2] 352 U.S. at 508.

The trial court in the instant case instructed the jury that it must be convinced by a preponderance of the evidence; that it must *weigh* the evidence; but if the evidence was equal, it must find against the party with the burden of proof (the plaintiff).[3]

Thus, the question presented to this court is whether or not a plaintiff in a FELA action must be saddled with this common law burden of persuasion,[4] or whether the rule of *Rogers*, carried to its logical conclusion, substantially modified plaintiff's burden of persuasion and requires only that plaintiff offer evidence from which the jury may infer, with reason, that employer negligence caused or contributed to the cause of plaintiff's injuries.

ARGUMENT

Every trial court in the nation violates the spirit of the rule and commits prejudicial error when it instructs the jury to return a verdict for the defendant if the evidence appears to be equally balanced or if it

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[3] The complete text of the instruction is:

"You are to consider the evidence as though it were being weighed on a scale and if upon any issue in the case, the evidence appears to be equally balanced or if you cannot say upon which side it weighs the heavier you should resolve the issue against the plaintiff upon whom the burden of proof rests. Mere speculation or guesswork will not suffice to prove any issue in this case." (Tr. 22)

[4] To convince the jury by a preponderance of evidence that the negligence of the defendant is more probable than not.

cannot tell which side weighs heavier, because in giving such charge, the court invades the province of the jury.

The evidence in this case, having been sufficient to submit to the jury for determination, the trial court should have instructed the jury that even if the evidence were equally balanced, or if it could not tell which weighed heavier, the jury must select from the proofs, with reason, the set of circumstances which the jury believed caused or contributed to the cause of plaintiff's harm; and further, that the jury was free to discard or disbelieve whatever facts were inconsistent with its conclusion.[5]

Beginning with the case of *Lavender* v. *Kurn*,[6] where the Court emphasized the requirement of a jury determination in an FELA case, even though a measure of speculation is involved, and culminating with the *Rogers* case, this Court has held that the injured railroad employee is entitled to a liberal construction of the principles of the Act. The FELA released railroad employees from the bondage of the common law burden of proof doctrines. The Fifth Circuit Court of Appeals in *Boeing Co.* v. *Shipman*[7] recognized this concept when it said that plaintiff's burden of proof in an FELA case is:

> ". . . much less than the burden required to sustain recovery in ordinary negligence actions."

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[5] See *Dennis* v. *Denver & Rio Grande W.R.R.*, 375 U.S. 208 (1963).

[6] 327 U.S. 645 (1946).

[7] 411 F.2d 365, 371 (5th Cir. 1969).

Other decisions by this Court have clarified the so-called *Rogers* rule and have re-emphasized the role of the jury in an action under the FELA:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . ."[8]

Justice Holman, speaking for the Oregon Supreme Court in the opinion under attack said:

> "It is not quite clear what plaintiff's 'something less' is. He says that 'the plaintiff . . . must only prove that the facts asserted could have happened or were reasonably possible. In other words, the jury might be persuaded by the "lightest" weighing piece of evidence that plaintiff is entitled to recover.' *If plaintiff is saying that the jury must be told that, if there is any evidence to sustain plaintiff's position, plaintiff must prevail, we are sure he is wrong.* If such were the situation, there would be no object in submitting an FELA case to a jury, because any case sufficient to go to the jury would automatically amount to a directed verdict for plaintiff. Plaintiff says that a jury can be persuaded by the

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[8] *Tennant* v. *Peoria & P.U.R. Co.*, 327 U.S. 29, 35, 64 S. Ct. 409, 38 L. Ed. 520, 525 (1944).
Accord: *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108 (1963); *Davis* v. *Baltimore & Ohio R.R.*, 379 U.S. 671 (1965).

> 'lightest' piece of evidence. This is a play on words. The jury was properly told that 'weight' referred to the convincing power of the evidence." (Emphasis added).

The italicized language clearly demonstrates either plaintiff's failure to convey to the Oregon Supreme Court the theory of his appeal or the failure or the unwillingness of the Oregon Court to carefully analyze the basis of the appeal. Petitioner does not take the position that the jury in such circumstance should be advised that any evidence of negligence or causation should result in a plaintiff's verdict. Petitioner merely contends that if there is any evidence of negligence or causation, even though it has less weight or is considered by the court less persuasive or convincing, yet with reason is classified by *the jury* as having greater convincing force or greater weight, then in such circumstances the jury is entitled to return a verdict in favor of the plaintiff. The instruction complained of forcefully informed the jury that an opposite conclusion must result even if the jury preferred to select from the evidence a lesser weighted theory of negligence and causation.

The classic common law doctrine of burden of persuasion—preponderance of evidence—greater weight of evidence — the more convincing evidence — must give way and a reasonable substitute definition of plaintiff's burden of persuasion must develop if the injured railroad employee is to be accorded the full benefits of the Act as previously defined by this

Court. The continued and almost universal practice of instructing the jury that plaintiff must prove his case by a preponderance of evidence or greater weight of the evidence in FELA cases must be halted. Justice Brennan, speaking for the Court in *Rogers*, recognized this necessity when he stated:

> "Special and important reasons for the granting of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination."[9]

CONCLUSION

For the reasons stated, this Court is urged to grant a writ of certiorari to the Supreme Court of Oregon in order to correct the erroneous instruction and formulate the guidelines for all federal and state courts to use in instructing the jury on plaintiff's burden of proof in an FELA case.

Respectfully submitted,

CARLTON R. REITER
GLENN H. PROHASKA
CLIFTON HILDEBRAND
Attorneys for Petitioner

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[9] *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957).

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF OREGON

Department 1

RAYMOND KELLEY,

Appellant,

v.

UNION PACIFIC RAILROAD CO., a corporation,

Respondent.

* * * * * * * * * *

Appeal from Circuit Court, Multnomah County

ALAN F. DAVIS, Judge

Argued and submitted December 2, 1970

Carlton R. Reiter, Portland, argued the cause for appellant. With him on the briefs were Glenn H. Prohaska, and Reiter, Day, Wall & Bricker, Portland.

Walter J. Cosgrave, Portland, argued the cause for respondent. With him on the brief were Randall B. Kester, and Maguire, Kester & Cosgrave, Portland.

Before O'CONNELL, Chief Justice,* and MCALLISTER, HOLMAN, and HOWELL, Justices.

HOLMAN, J.

Affirmed.

HOLMAN, J.

Plaintiff brought an action for damages for in-

* O'Connell, C. J., did not participate in the decision of this case.

juries sustained while in the employment of the defendant. The action was based upon the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51.[1] Plaintiff appealed from a judgment for defendant which was entered pursuant to a jury verdict.

The sole assignment of error is the giving of the italicized portion of the following instruction:

> "Preponderance of the evidence means the greater weight of the evidence, not necessarily the greater volume of the evidence but the more convincing evidence. It may be defined as requiring proof that the facts asserted were more probably true than false. *You are to consider the evidence as though it were being weighed on a scale and if upon any issue in the case, the evidence appears to be equally balanced or if you cannot say upon which side it weighs the heavier, you should resolve the issue against the plaintiff upon whom the burden of proof rests. Mere speculation or guesswork will not suffice to prove any issue in this case.* The law does not require demonstration, that is, such a degree of proof as, excluding the possibility of error produces absolute certainty because such proof is rarely possible. A preponderance of evidence, as that term has been defined by me, only is required."

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[1] "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Plaintiff contends that the instruction is erroneous because a plaintiff's burden of persuasion in an FELA case is "something less" than a preponderance of the evidence. He bases his contention upon a series of decisions of the United States Supreme Court, commencing with *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), and including *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). Illustrative of the language which leads plaintiff to his present contention is the following excerpt from *Rogers*:

> "Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question that is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." 352 U.S. at 506-07.

It is not quite clear what plaintiff's "something less" is. He says that "the plaintiff . . . must only prove that the facts asserted could have happened or

were reasonably possible. In other words, the jury might be persuaded by the 'lightest' weighing piece of evidence that plaintiff is entitled to recover." If plaintiff is saying that the jury must be told that, if there is any evidence to sustain plaintiff's position, plaintiff must prevail, we are sure he is wrong. If such were the situation, there would be no object in submitting an FELA case to a jury, because any case sufficient to go to the jury would automatically amount to a directed verdict for plaintiff. Plaintiff says that a jury can be persuaded by the "lightest" piece of evidence. This is a play on words. The jury was properly told that "weight" referred to the convincing power of the evidence.

The cases relied upon by plaintiff[2] are all cases concerning what constitutes sufficient evidence to submit an FELA case to the jury, as the quoted excerpt from *Rogers* indicates. The difficulty with plaintiff's position is that it confuses the test for determining when a case is submissible to a jury with the degree of persuasion plaintiff must establish in the minds of the jury before they may return a verdict for him. Plaintiff purports to see in the language of the cases upon which he relies some lessening of the burden of persuasion imposed upon a plaintiff in FELA cases, as compared with the burden imposed on a plaintiff

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[2] In addition to those cases cited in the body of the opinion, *see Davis* v. *Baltimore & O. R. Co.*, 379 U.S. 671, 85 S. Ct. 636, 13 L. Ed. 2d 594 (1965); *Dennis* v. *Denver & Rio Grande R. Co.*, 375 U.S. 208, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963); *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963).

at common law. Although there is sufficient ambiguous language in these cases to cause plaintiff to make such a contention,[3] the fact remains that, in each instance, such language was used in deciding whether there had been sufficient evidence to submit a case to the jury. Therefore, we do not read the cases as plaintiff reads them.

The judgment of the trial court is affirmed.

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[3] Apparently, plaintiff's lawyer unsuccessfully attempted to make the same contention in the case of *Caplinger* v. *N. P. Terminal of Oregon*, 244 Or 289, 418 P2d 34 (1966).